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MIKE M. MADANI, *et al.*,

Plaintiffs,

vs.

SHELL OIL COMPANY, *et al.*,

Defendants.

CASE NO. CV-07 04296 MJJ

DEFENDANTS' JOINT REPLY
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS COMPLAINT
PURSUANT TO F.R.C.P. 12(B)(6)

Date: December 18, 2007
Time: 9:30 a.m.
Dept.: Courtroom 11, 19th Floor
Judge: Hon. Martin J. Jenkins

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1 **I. INTRODUCTION**

2 Plaintiffs admit that this case is an attempted “do-over” of *Dagher*. This case was
 3 filed more than seven years after *Dagher*, by the very same plaintiffs’ counsel, on behalf of a
 4 group of named plaintiffs that even included the lead named plaintiff here — Mike Madani. Mr.
 5 Madani and his counsel made the strategic judgment in *Dagher* to waive any rule of reason
 6 antitrust claim (either a Sherman Act section 1 rule of reason claim or a Clayton Act section 7
 7 claim, which can be brought only under the rule of reason) and pursue only a per se (and “quick
 8 look”) claim under Section 1 of the Sherman Act. After extensive discovery on the per se claim,
 9 it was determined by the District Court — and then a unanimous United States Supreme Court —
 10 that the claim failed as a matter of law. So plaintiffs now want to go back and do the case over
 11 with a new complaint that raises the very rule of reason claims that plaintiffs explicitly waived in
 12 *Dagher*. As shown in defendants’ moving papers, plaintiffs’ attempted reliance on the class
 13 action tolling doctrine to evade the applicable statute of limitations is the sort of abusive litigation
 14 tactic that the Supreme Court, the Ninth Circuit and the district courts have refused to permit. For
 15 example, while class action tolling is inapplicable if the claim in the initial case did not involve
 16 “the same evidence, memories and witnesses” as the claims in the later case, Plaintiffs
 17 specifically admit that the claims in this case “will require the development of additional evidence
 18 concerning relevant market and effects on competition, not in the *Dagher* record, as called for by
 19 a full rule of reason inquiry.” Transfer Motion Opposition at 9:4-6.

20 Plaintiffs’ invocation of “efficiency and judicial economy” (Opposition at 10:20)
 21 is especially misplaced. As recognized by Judge King in *Dagher* when he inquired whether
 22 plaintiffs were waiving proceeding under the rule of reason, the efficient and economical course
 23 would have been to join all legal theories and claims in *Dagher*. If the current plaintiffs were
 24 dissatisfied with their current counsel’s decision to waive any rule of reason claim (other than Mr.
 25 Madani, of course, as the waiver was made by counsel who was appearing on his behalf at the
 26 time of the waiver), they could and should have promptly intervened or filed their own rule of
 27 reason claims for consolidation with the *Dagher* claim.

1 Instead, plaintiffs are doing exactly what Judge King warned against seven years
 2 ago — that is, waiting to see how a per se claim turned out and then, if that claim was not
 3 successful, filing a belated new complaint and commencing the litigation process all over again
 4 with rule of reason claims. To use plaintiffs' own words (Opposition at 10:21), a timely
 5 intervention in (or additional lawsuit consolidated with) *Dagher* "would [have] be[en] far more
 6 efficient and require[d] fewer judicial resources than" the current do-over class action. Plaintiffs
 7 have no response whatsoever to the *Westinghouse* court's refusal to extend class action tolling to
 8 a claim that had been abandoned in the initial putative class action, when that previously-
 9 abandoned claim was asserted by the same counsel in a subsequent putative class action with a
 10 different named plaintiff. Yet that is just what plaintiffs are attempting here, albeit with the
 11 additional "abusive manipulation[]" of making one of the plaintiffs in the initial putative class
 12 action the lead plaintiff in the subsequent case. *In re Westinghouse Securities Litig.*, 982 F. Supp.
 13 1031, 1034 (W.D. Pa. 1997). Tellingly, the Opposition does not so much as mention
 14 *Westinghouse*.

15 Further, defendants' moving papers showed that the complaint is fatally flawed on
 16 the separate and independent basis that the complaint does not plead a relevant market in which
 17 the challenged conduct could have had an anticompetitive effect — an essential element of any
 18 rule of reason claim. Plaintiffs' sole response is that the complaint makes generalized reference
 19 to numerous geographic areas in which Equilon and Motiva operated. But that is no response at
 20 all. The opposition concedes by its silence that (1) there is no factual basis alleged for finding
 21 any of these geographic areas to be a relevant market for antitrust purpose, and (2) the
 22 complaint's affirmative allegations about the relatively low market share of the joint ventures in
 23 any identified geographic area preclude a rule of reason claim.

24 For all of these reasons, this Court should grant the current motion and dismiss
 25 plaintiffs' complaint. Further, because the deficiencies in plaintiffs' complaint cannot be cured
 26 by amendment, and no amendment has been requested or proposed, the dismissal should be with
 27 prejudice.

28

1 **II. ARGUMENT**

2 **A. The Complaint Is Time Barred**

3 Plaintiffs do not dispute that, unless class action tolling applies, their complaint is
 4 time-barred and should be dismissed with prejudice. Plaintiffs' sole argument is that the
 5 limitations period was tolled under the class action tolling doctrine. Contrary to plaintiffs'
 6 arguments, that doctrine has no application here.

7 **1. The Ninth Circuit's *Robbin* Decision Precludes Application Of Class
 8 Action Tolling Here**

9 As shown in defendants' moving papers, the Ninth Circuit squarely held in *Robbin*
 10 *v. Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987), that class action tolling is limited to subsequent
 11 individual actions; the doctrine does not apply to subsequent putative class actions. “[T]o extend
 12 tolling to class actions ‘tests the outer limits of the *American Pipe* doctrine and . . . falls beyond
 13 its carefully crafted parameters into the range of abusive options.’” *Id.* at 214. *See Crown, Cork*
 14 & *Seal Co. v. Parker*, 462 U.S. 345, 346, 103 S. Ct. 2392, 2394 (1983) (extending class action
 15 tolling from plaintiffs who intervene in the original action to plaintiffs who file their own
 16 “individual actions”). Plaintiffs expressly acknowledge that, in *Robbin*, the Ninth Circuit issued a
 17 “broad holding” that tolling is unavailable in subsequent putative class actions (such as plaintiffs
 18 plead here), and that the broad *Robbin* holding has been followed by the First, Second, Fifth,
 19 Sixth and Eleventh Circuits. Opposition at 9:5-28.¹ As the *Westinghouse* court summarized the
 20 law, “the pendency of a previously filed class action does not toll the limitations period for
 21 additional class actions by the putative members of the original asserted class.” *In re*
 22 *Westinghouse*, 982 F. Supp. at 1034 (quoting *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988)).

23 Plaintiffs argue that, in the Ninth Circuit, *Catholic Social Services* has entirely
 24 supplanted the “broad” *Robbin* holding except where “the plaintiffs in the subsequent class action

25
 26 ¹ Plaintiffs assert that the Second Circuit has left open the possibility of an exception where the
 27 putative class in the second case is potentially a proper subclass of the putative class in the initial
 28 case. *Id.* at 9:12-13. Plaintiffs concede that the Second Circuit did not determine that such an
 exception would be valid, and in any event such a potential exception is not even arguably present
 here, where the putative class is co-extensive with the putative class in *Dagher*.

were merely seeking to relitigate the correctness of the district court's denial of class certification." Opposition at 8:6-7. Plaintiffs are wrong. As shown in the moving papers, the Ninth Circuit in *Catholic Social Services* went to great lengths to set forth the extreme nature of the facts in that case, to demonstrate that the plaintiffs there were "in a fundamentally different posture from plaintiffs in cases in which subsequent class actions were not allowed." *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139, 1149 (9th Cir. 2000). Those facts were much more than that the later case was not an attempt to re-litigate an earlier denial of class certification. Rather, a critical fact was that there had been a change of law during the appellate proceedings in the prior case, and that change required that different named plaintiffs pursue the claims at issue. *Id.* at 1146. In light of this circumstance, the Ninth Circuit en banc majority believed "that it would have been by far the better course for the panel" of the court that heard the prior appeal "to remand with instructions to allow amendment of the complaint to satisfy requirements imposed for the first time while the case was on appeal," rather than to require that a new action be filed. *Id.* As the en banc majority noted, "[i]f the panel in [the prior case] had allowed such amendment, there would be no tolling and class certification issues." *Id.* But because the prior panel did not do that, a divided en banc panel determined that it was appropriate to create a fact-bound exception to the uniform rule throughout the country that tolling applies only in subsequent individual actions.

If the Ninth Circuit majority intended in *Catholic Social Services* to create any broader of an exception to that generally-accepted rule, the majority would have explicitly so stated. Certainly there is no reason to believe that the Ninth Circuit was *sub silentio* abrogating the *Robbin* rule to allow plaintiffs to use class action tolling to allow a stale class action. The essential rationale of the *Robbin* rule is that "*American Pipe and Crown, Cork* represent a careful balancing of the interest of plaintiffs, defendants, and the court system" (*Robbin*, 825 F.2d at 214 (internal quotation marks omitted)), and that allowing subsequent class actions exceeds the limits of that balance because it would permit "putative class members [to] piggyback one class action onto another and thus toll the statute of limitations indefinitely." *Korwek v. Hunt*, 827 F.2d 874, 878 (2d Cir. 1987) (citation and internal quotation marks omitted). That rationale applies

1 regardless of whether the initial class action was rejected because class certification was denied or
 2 because the underlying claim was found to be without merit. Either way, the policies of judicial
 3 economy and repose dictate that no new round of class litigation be permitted.

4 Finally, the Third Circuit's decision in *Yang v. Odom*, 392 F.3d 97 (3d Cir. 2004),
 5 does not help plaintiffs. *Yang* held only that a successive class action is not barred when the first
 6 class action was rejected because of inadequacies in the named class representatives. This was a
 7 "circumstance [...] unrelated to the warnings expressed in *American Pipe and Crown, Cork &*
 8 *Seal*, which concerned the potential for abuse where counsel could manipulate a complaint to
 9 trigger tolling." *Id.* at 112. By contrast, the Court is here presented with a situation not
 10 considered by *Yang* and in which manipulating a complaint to trigger tolling appears to be
 11 precisely what has been attempted.

12 **2. Class Action Tolling Is Inapplicable Because Plaintiffs' Claims Here
 13 Are Different From The Claim in *Dagher***

14 Plaintiffs admit that their claims here "are not identical" to the claim in *Dagher*
 15 (Transfer Motion Opposition at 8:11), were "never considered" in *Dagher* (*id.* at 8:27-28) and
 16 will require "the development of additional evidence concerning relevant market and effects on
 17 competition, not in the *Dagher* record" (*id.* at 9:4-5), as well as "a somewhat different and more
 18 extended analysis of the challenged conduct and its effects on competition in a relevant market"
 19 (Opposition at 12:5-6). Plaintiffs also admit that class action tolling does not apply unless the
 20 subsequent claims concern "*the same* evidence, memories, and witnesses as the subject matter of
 21 the original class suit." Opposition at 11:4-5 (quoting Justice Powell's concurrence in *Crown,*
 22 *Cork & Seal*) (emphasis added). Regardless of whether there will be some overlap, the evidence,
 23 memories and witnesses relevant to the current rule of reason claims clearly will not be "*the*
 24 *same*" as the evidence, memories and witnesses relevant to the *Dagher* per se claim.

25 As a threshold matter, by plaintiffs' own admission, *Dagher* concentrated
 26 exclusively on Equilon's and Motiva's unification of the pricing of Shell and Texaco branded
 27 gasoline. The legality under the antitrust laws of the actual formation of the joint ventures was
 28 not challenged in *Texaco, Inc. v. Dagher*, 547 U.S. 1, ___ 126 S. Ct. 1276, 1280 n. 1(2006).

1 Notably, plaintiffs' Opposition never explains how the evidence, memories and witnesses
 2 relevant to their current challenge to the formation of the joint ventures might be legitimately
 3 characterized as "the same" as the evidence, memories and witnesses relevant to *Dagher's*
 4 challenge to the joint ventures' pricing policy. By any stretch of the imagination, these are the
 5 quintessential sort of "different or peripheral claims" to which Justice Powell warned against
 6 extending the class action doctrine. *See Crown, Cork & Seal Co*, 462 U.S. at 354 (Powell, J.,
 7 concurring).

8 Unable to enunciate any argument that the current challenge to the formation of
 9 the joint ventures should qualify for class action tolling (a challenge that is both part of plaintiffs'
 10 Sherman Act section 1 claim, *see Compl.* ¶ 115, and all of plaintiffs' Clayton Act section 7 claim,
 11 *see id.* ¶ 117), the Opposition focuses exclusively on the purported overlap between *Dagher's* per
 12 se challenge to the pricing policy and that portion of the current Sherman Act section 1 claim that
 13 challenges the pricing policy under the rule of reason. But even setting aside that the current
 14 complaint challenges the formation of the joint ventures whereas *Dagher* did not, plaintiffs are in
 15 no position to downplay the differences between their current rule of reason challenge to the joint
 16 ventures' price unification policy and the prior per se challenge to that policy. It is plaintiffs who
 17 are relying on differences between these claims to contend that their current rule of reason
 18 challenge to the price unification policy might be viable despite the Supreme Court's unanimous
 19 holding in *Dagher* that a per se challenge was not. To the extent that the differences are so slight
 20 that the evidence will be the same, plaintiffs have no basis whatsoever for arguing that a rule of
 21 reason challenge may be viable.

22 As shown in defendants' moving papers and conceded by plaintiffs, a rule of
 23 reason claim here will have to include proof regarding the structure of the relevant market and
 24 the actual effects of the challenged restraint in that relevant market. One indication of the extent
 25 of the additional evidence that is necessary on these issues is the length of the ABA's model jury
 26 instructions for proving the "unreasonableness" element of a rule of reason violation: The
 27 instructions span nine pages. *See ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS*
 28 *IN CIVIL ANTITRUST CASES A-4 to A-12 (2005 Ed.)*. Plaintiffs do not and cannot contend that

1 these were elements of the per se or quick look claim in *Dagher*. To the contrary, in *Dagher*
 2 plaintiffs' issues lead counsel Mr. Alioto explicitly told Judge King that, unlike in "the customary
 3 Rule of Reason" case, "the issues of market power and impact upon the market are not an issue"
 4 in a per se or quick look case (and were not an issue in *Dagher*). Transcript of Dec. 6, 1999
 5 *Dagher* Hearing (Exh. I to moving papers), at 14:25-15:2.

6 Likewise in their opposition to the current motion, plaintiffs admit that the
 7 evidence in *Dagher* will not be sufficient for their purposes here; instead, that evidence will need
 8 to be "*supplemented by* expert testimony and other industry and market evidence" that was not
 9 relevant to *Dagher* because the "inquiry [is] broadened" under the rule of reason. Opposition at
 10 13:2-4 (emphasis added). The long passage of *California Dental Ass'n. v. Federal Trade*
 11 *Commission*, 526 U.S. 756, 779-80 (1999) that is quoted in the Opposition (at 12:14-25) merely
 12 shows that the dividing lines between the main categories of antitrust analysis are not always
 13 sharp. As a leading treatise explains, "the two standards overlap *at the margins*," such as with
 14 group boycotts or tying arrangements. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW
 15 DEVELOPMENTS 48 (6th ed. 2007) (emphasis added). This does not diminish the fact that, for the
 16 particular claims at issue here, the required analysis under the rule of reason is dramatically
 17 different from that under the per se rule and, as plaintiffs now admit, will require presentation of
 18 evidence, memories and witnesses that were not relevant to *Dagher*. Once again, plaintiffs'
 19 counsel made a simiar admission in *Dagher*. See Transcript of Dec. 6, 1999 *Dagher* Hearing
 20 (Exh. I to moving papers), at 15:8-15 (noting that courts in quick look cases "sometimes consider
 21 . . . pro-competitive issues, and those that are against it. *But they don't consider market power.*
 22 *They don't consider impacts on the market.*") (emphasis added).

23 Plaintiffs do not help their cause in relying on the Ninth Circuit's decision in *Tosti*
 24 for the point that a claim does not have to be "identical" to the claim in the initial litigation for
 25 class action tolling to apply. *Tosti* involved a plaintiff who opted out of the initial class litigation
 26 and settlement to pursue her own claim individually. As quoted by plaintiffs, the rationale of
 27 *Tosti* is that "one of the primary reasons a [class] member will opt out of a class suit is that she
 28 has strong individual claims against the defendant that she believes will not be redressed by the

1 overall class settlement.” Opposition at 14:20-21 (quoting *Tosti v. City of Los Angeles*, 754 F.2d
 2 1485, 1489 (9th Cir. 1985). That rationale has no applicability here. In seeking to represent the
 3 same putative class as in *Dagher*, the named plaintiffs here necessarily allege that their claims are
 4 “typical of the class generally” and that they “share the exactly [sic] same interests as the other
 5 members of the class.” Compl. ¶ 6. The claims asserted here are different from that asserted in
 6 *Dagher* not because of the uniqueness of the plaintiffs’ situation but instead because of the
 7 strategic choice of the various plaintiffs and their counsel.

8 **3. Plaintiffs’ Claims Are Time-Barred Regardless Of The Applicability**
 9 **Of Class Action Tolling**

10 In their moving papers, defendants showed that, even if class action tolling applied
 11 here, plaintiffs’ claims are time-barred because tolling ends when the district court determines
 12 that a class action will not proceed. Plaintiffs offer nothing to challenge the rule that tolling does
 13 not continue during subsequent appellate proceedings, but would attempt to limit that rule to
 14 explicit denials of class certification and appellate proceedings concerning class certification.
 15 The *Westinghouse* court properly rejected this very same argument, holding that “the dismissal of
 16 an entire civil action is about as ‘definitive’ a disposition of a motion for class certification as one
 17 is likely to find.” *In re Westinghouse*, 982 F. Supp. at 1035. A number of other courts have ruled
 18 similarly that it does not matter for this purpose whether the determination that a class action will
 19 not proceed is a class certification denial or a merits dismissal. *See* cases cited in moving papers
 20 at 14:9-17.

21 Plaintiffs sole argument against this rule is that denial of class certification is less
 22 likely to be reversed on appeal than dismissal of the litigation on the merits. It is true that courts
 23 that have *refused* tolling during the time period of appellate proceedings regarding class
 24 certification have noted that class certification decisions are rarely overturned. But it does not
 25 follow that tolling should be permitted during the time period of other appellate proceedings. Nor
 26 is there authority to support such an extension. “The general rule is that the judgment of a district
 27 court becomes effective and enforceable as soon as it is entered; there is no suspended effect
 28 pending appeal unless a stay is entered.” *In re Copper Antitrust Litig.*, 436 F.3d 782, 793

1 (7th Cir. 2006) (describing the issue as whether “the class certification question should somehow
 2 be exempt from this rule,” and answering the question in the negative).

3 Regardless of why a district court determines that class claims may not proceed, a
 4 putative class member is on notice that she may have to take steps to preserve her claims. “The
 5 essential rationale of *American Pipe* is that members of a class whose claims are embodied in a
 6 class action should not be required by the exigencies of the statute of limitations to clutter the
 7 courts with duplicative lawsuits *as long as their claims are encompassed by the class action.*” *Id.*
 8 at 794 (emphasis added). This essential rationale applies regardless of whether the putative class
 9 member’s claims are no longer encompassed by the class action because the district court has
 10 ruled that class certification is inappropriate or because the district court has ruled that the claims
 11 fail on the merits. If a putative class member believes that proceeding with her additional claims
 12 concurrently with an appeal in the initial litigation is inefficient, there is a judicially-recognized
 13 option: The “putative class member who wishes to preserve both rights should file her individual
 14 suit and immediately seek a stay of the individual suit” pending the outcome of the appeal.
 15 *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1391 (11th Cir. 1998). At that juncture, the
 16 district court can balance the chances for an appellate reversal against the expected delay in
 17 determining whether the stay should be granted. “This is a just, efficient result.” *Id.* By contrast,
 18 the current case itself vividly illustrates the potential for abuse that would be created by a further
 19 extension of the class action tolling doctrine to the time period during which an appeal of a
 20 substantive dismissal of a prior action is pending — thereby eliminating the judicial control over
 21 when related claims should proceed that exists with the just-discussed motion to stay procedure.
 22 Such a further extension of the class action doctrine would be a far cry from the usual “short”
 23 period (*id.* at 1390) for which class action tolling is meant to apply.

24 **4. Plaintiffs’ Res Judicata Argument Is Irrelevant**

25 Plaintiffs spend a portion of their Opposition arguing that *Dagher* does not bar
 26 their claims under the doctrine of *res judicata*. *See* Opposition at Argument, § I.D. The
 27 applicability of *res judicata* is irrelevant to the current motion. The question is not whether
 28 plaintiffs here are bound by the waiver of rule of reason claims or the decision in *Dagher*.

1 Rather, the question is whether plaintiffs can show that class action tolling should apply to allow
 2 them to delay filing rule of reason claims until many years after the statute of limitations has run.
 3 Plaintiffs cannot do so for the reasons discussed here and in defendants' moving papers.

4 **5. Efficiency And Judicial Economy Support Dismissal Here**

5 Plaintiffs suggest that the Court consider efficiency and judicial economy in
 6 whether class action tolling should be extended to their claims here. Defendants agree that these
 7 are relevant considerations. But plaintiffs create a false dichotomy in suggesting that the only
 8 alternative to their current belated filing was for them to file their claims after the district court
 9 dismissed *Dagher* but before the Supreme Court affirmed. The obvious additional alternative
 10 would have been to file these claims promptly after the *Dagher* plaintiffs and their counsel
 11 waived them. The claims could then have been joined with the *Dagher* claim in the same lawsuit
 12 or in a consolidated lawsuit. *See Transcript of Dec. 6, 1999 Dagher Hearing (Exh. I to moving*
 13 *papers), at 15:24-16:2 ("THE COURT: All I want to make sure is that I am giving you an*
 14 *opportunity to at least amend to include what you call customary Rule of Reason analysis . . .").*
 15 As the Court of Appeals has noted:

16 If the requirements of the statute of limitations result in the [later case's] being
 17 brought while the [initial case] is pending, there is no inefficiency or unfairness.
 18 The plaintiff has simply invoked an additional statutory right at an appropriate
 19 time.

20 *In re Copper Antitrust Litig.*, 436 F.3d at 795. Here, it would obviously have been more efficient
 21 for both the judiciary and the parties for the current claims to be considered (if at all) in
 22 conjunction with the *Dagher* claim. Indeed, that is the rationale behind the rule that, if a party has
 23 related claims, she must generally join them in a single lawsuit. That rationale counsels against
 24 extending the class action tolling doctrine to the do-over class action that plaintiffs have filed
 25 here.

26 **6. Tolling Is Unavailable As Against Saudi Refining In any Event**

27 a. ***The Dagher Plaintiffs Lacked Standing Against Saudi Refining***

28 Saudi Refining has moved to dismiss on the additional basis that tolling is

1 unavailable against it because the *Dagher* plaintiffs lacked standing as against Saudi Refining.
 2 Plaintiffs concede that the *Dagher* plaintiffs did not have standing to assert claims against Saudi
 3 Refining but contend that the claims were tolled nonetheless. Opposition at 19:7-8, 20-23.

4 Plaintiffs do not dispute the holding in *Palmer v. Stassinos*, 236 F.R.D. 460 (N.D.
 5 Cal. 2006), but instead try to distinguish it on the irrelevant ground that the plaintiffs here were
 6 not parties to the *Dagher* action. Opposition at 19:18-20. *Palmer* has nothing to do with whether
 7 the plaintiffs in the second class action were also plaintiffs in the first class action. Rather,
 8 *Palmer* stands for the uncontroversial proposition that the filing of a purported class action
 9 complaint by a plaintiff that lacks standing does not toll the statute of limitations for any plaintiff.
 10 236 F.R.D. at 466 n.6 (it is beyond the power of a court “to toll a period of limitations based on a
 11 claim that failed because the claimant had no power to bring it”).

12 Plaintiffs completely ignore the remaining line of cases which hold that a
 13 purported class action filed by a named plaintiff without standing does not toll the statute of
 14 limitations for subsequent class actions. See moving papers at 14-15 (citing *In re Colonial Ltd.*
 15 *P'ship Litig.*, 854 F. Supp. 64, 82 (D. Conn. 1994) (“[I]f the original plaintiffs lacked standing to
 16 bring their claims in the first place, the filing of a class action complaint does not toll the statute
 17 of limitations for other members of the purported class.”); *In re Crazy Eddie Sec. Litig.*, 747 F.
 18 Supp. 850, 856 (E.D.N.Y. 1990) (tolling does not apply to a “class action brought after a previous
 19 class action has been dismissed for lack of standing”). See also *In re Elscint, Ltd. Sec. Litig.*,
 20 674 F. Supp. 374, 378 (D. Mass 1987) (to allow such tolling would “condone or encourage
 21 attempts to circumvent the statute of limitation by filing a lawsuit without an appropriate plaintiff
 22 and then searching for one who can later intervene with the benefit of the tolling rule”).

23 The only case cited by plaintiffs, *Haas v. Pittsburgh Nat'l Bank*, 526 F.2d 1083,
 24 1086 (3d Cir. 1975) (Opposition at 19:23), is inapposite. In *Haas*, the court granted class
 25 certification as against three banks. The court subsequently determined that the named plaintiff
 26 did not have standing with respect to one of the defendant banks, Equibank. *Id.* The court
 27 allowed the complaint to be amended to add a nominal plaintiff who had standing against
 28 Equibank. *Id.* The Third Circuit held that the amendment to add the additional plaintiff was

1 timely because the filing of the class action had tolled the statute of limitations and the
 2 amendment “relates back” to the initial filing of the complaint. *Id.* at 1098.

3 The *Haas* court considered whether tolling applied in the limited circumstance of a
 4 plaintiff being added to an *existing* class action by way of an amendment that “related back” to
 5 the *original* complaint. Neither element is present here. The *Dagher* action is long over and
 6 there is no suggestion (and no possibility) that the instant claims “relate[] back” to the filing of
 7 the original *Dagher* complaint. *Id.* at 1095-96. Rather, plaintiffs waited more than eight years
 8 after the *Dagher* action was filed and five years after the *Dagher* action was dismissed against
 9 Saudi Refining to bring this action. This contrasts starkly with *Hass* in which there was a
 10 “prompt addition” (*id.* at 1097) of a nominal plaintiff in the original class action.

11 Finally, plaintiffs contend that not permitting tolling here would lead to the
 12 “absurd result of forcing putative class plaintiffs to file duplicative individual or class actions to
 13 preserve their claims.” Opposition at 20:34. Surely plaintiffs do not mean that it would have
 14 been unnecessarily duplicative to include a named plaintiff with standing against Saudi Refining
 15 in the original *Dagher* action. Moreover, once it was determined that the *Dagher* plaintiffs lacked
 16 standing, there were *no* claims pending against Saudi Refining so there would have been nothing
 17 “duplicative” about new plaintiffs bringing actions to preserve their claims against Saudi
 18 Refining. In addition, this not a question of whether the Court should permit tolling in its
 19 discretion in order to avoid a particular result which plaintiffs find “absurd.” Standing is a
 20 constitutional limitation on the power of federal courts, and it is beyond the power of a federal
 21 court to toll a period of limitations based on a claim that failed because the claimant had no
 22 standing to bring it. *Palmer*, 236 F.R.D. at 466 n.6 (“courts cannot be concerned with matters
 23 that are beyond their powers to affect”); *see also* *Walters v. Edgar*, 163 F.3d 430, 432-33 (7th Cir.
 24 1998).

25 **b. The Statute Of Limitations Has Expired Against Saudi Refining**

26 Finally, even if tolling did apply here, Saudi Refining submits that plaintiffs would
 27 have no claim against it. The argument that the August 14, 2002 final judgment in the District
 28 Court ceased any tolling applies with particular force to Saudi Refining as that final judgment was

1 affirmed by the Ninth Circuit as to Saudi Refining. *Dagher v. Saudi Refining, Inc.*, 369 F.3d
 2 1108 (9th Cir. 2004). Furthermore, the Ninth Circuit affirmed as to Saudi Refining on June 1,
 3 2004 — over three years and two months before the *Madani* complaint was filed. The Ninth
 4 Circuit’s decision ended the case for Saudi Refining for all purposes. The Equilon and Motiva
 5 joint ventures, the formation of which plaintiffs challenge here, were formed on July 1, 1998
 6 (Comp. ¶ 76) — 349 days before plaintiffs filed the *Dagher* action. Thus, even if tolling did
 7 apply during appellate review of the District Court’s final judgment (and it did not, *see* § II.A.3.
 8 above), over four years of non-tolled time passed as to any claims against Saudi Refining and the
 9 claims against Saudi Refining must be dismissed.

10 **B. Plaintiffs Do Not Sufficiently Allege A Relevant Market In Which The**
 11 **Challenged Conduct Could Have Had An Anticompetitive Effect**

12 Plaintiffs wholly fail to justify their failure to allege a relevant geographic market
 13 or market power — fundamental elements of their rule of reason claims. Plaintiffs first try to
 14 argue around the applicable pleading standard. Relying on *Erickson v. Pardus*, 127 S. Ct. 2197
 15 (2007), plaintiffs argue that “*Twombly* has not abolished notice pleading.” Opposition at 20:8.
 16 That may be true, but *Twombly* did clarify the extent of the required plain statement in the context
 17 of an antitrust case. Specifically, *Twombly* held that the complaint must “possess enough heft to
 18 sho[w] that the pleader is entitled to relief.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955,
 19 1959 (2007). To do so, the complaint must allege enough facts to state a claim that is not merely
 20 “conceivable” but instead “plausible on its face.” *Id.* at 1974 (emphasis added). Furthermore, as
 21 recognized in *Erickson*, plaintiffs must “give the defendant fair notice of what the . . . claim is
 22 and the grounds upon which it rests.” *Erickson*, 127 S. Ct. at 2200 (emphasis added). Even if
 23 plaintiffs were correct that *Twombly* added nothing to the governing pleading standards, the
 24 complaint would fail to meet that standard, because the complaint fails to plead a relevant
 25 geographic market in which the challenged conduct could have had an anticompetitive effect.

26 **1. Relevant Geographic Market**

27 Plaintiffs do not even try to justify the deficiency in their relevant market
 28 allegations with respect to their Section 1 claim. *See* moving papers at 16 (*citing Tanaka v.*

1 *University of Southern California*, 252 F.3d 1059, 1063 (9th Cir. 2001); *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1101 (9th Cir. 1999); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997); *America Channel, LLC v. Time Warner Cable, Inc.*, No. 06-2175, 2007 WL 1892227, at *6 (D. Minn. June 28, 2007)). Their only argument is that their Section 7 is sufficient because such a claim purportedly requires a showing only that “the merger [] have a substantial anticompetitive effect *somewhere* in the United States.” Opposition at 21:11-12 (quoting *United States v. Pabst Brewing*, 384 U.S. 546, 549-50 (1966)). But this is merely a statement that, to violate Section 7, a merger’s allegedly anticompetitive effects need not manifest themselves throughout the entire United States. The statement does not excuse a plaintiff from its obligation to identify one or more relevant geographic markets within the United States. See, e.g., *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 512 F.2d 1264, 1270-71 (9th Cir. 1975) (determination of the relevant market is a necessary predicate to finding a violation of Section 7 because monopoly must “substantially lessen competition ‘within the area of effective competition’”); *Tanaka*, 252 F.3d at 1063 (dismissing complaint that failed sufficiently to allege an “area of effective competition”); *Big Bear Lodging Ass'n*, 182 F.3d at 1101 (same).

17 Plaintiffs concede that the entirety of the complaint’s relevant market allegations
18 are its general references to various states and a small number of cities. See Opposition at 21:16-
19 23. The complaint provides no explanation of which of these overlapping geographic areas (in
20 addition to the unspecified “pricing areas” mentioned in the complaint) are the purportedly
21 relevant geographic markets in this case and, thus, what areas defendants would need to analyze
22 in terms of market power, pricing, competitive effects, etc., were this case to proceed. See, e.g.,
23 *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963) (on a Section 7 claim, a plaintiff
24 must first define the relevant market and then establish anticompetitive consequences).
25 Particularly after *Twombly*, a rule of reason antitrust claim cannot proceed based upon allegations
26 that are this cursory.

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1 **2. Market Power**

2 Plaintiffs do not even attempt to justify their failure to allege market power in any
 3 purportedly relevant market and apparently concede that the market share numbers alleged in the
 4 complaint are insufficient as a matter of law to show any anticompetitive effects in a relevant
 5 market. *See* moving papers at 18 (*citing Valley Liquors, Inc. v. Renfield Imps., Ltd.*, 822 F.2d
 6 656, 666 (7th Cir. 1987); *Tanaka*, 252 F.3d at 1063 ; *Big Bear Lodging Ass'n*, 182 F.3d at 1101).
 7 In other words, plaintiffs concede by their silence that they have not alleged sufficient market
 8 power in a relevant geographic market to support a plausible (or even a possible) antitrust claim
 9 under the rule of reason. Nor do plaintiffs make any attempt to refute that this deficiency is fatal
 10 to their claims.

11 **C. The Court Should Dismiss Plaintiffs' Complaint Without Leave To Amend**

12 Because the complaint affirmatively shows that plaintiffs' claims are time-barred
 13 as a matter of law, the claims cannot be salvaged by amendment and the Court should dismiss the
 14 complaint with prejudice. *Deutsch v. Turner Corp.*, 324 F.3d 692, 718 (9th Cir. 2003) (affirming
 15 dismissal with prejudice where claims were barred by the applicable statute of limitations and
 16 plaintiffs offered no rationale for tolling nor proposed any amendment that would save their
 17 claims); *Naas v. Stolman*, 130 F.3d 892, 893 (9th Cir. 1997). Similarly, plaintiffs have neither
 18 requested leave to amend their allegations regarding anticompetitive effects in any relevant
 19 market, nor proposed how any amendment could save the flawed allegations on this subject.
 20 Leave to amend should be denied on this additional basis. *See, e.g., Cook, Perkiss and Liehe, Inc.*
 21 *v. N. California Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990); *Albrecht v. Lund*, 845
 22 F.2d 193, 195-96 (9th Cir. 1988).

23 **III. CONCLUSION**

24 The Court should grant this motion and dismiss plaintiffs' complaint with
 25 prejudice.

26
 27
 28

1 DATED: December 4, 2007

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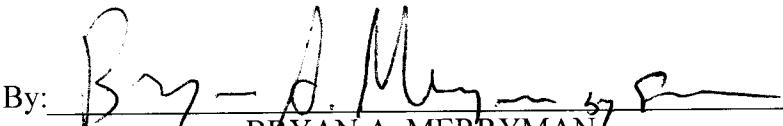
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27 **Filer's Attestation:** Pursuant to General Order No. 45, § X(B), I attest under
28 penalty of perjury that concurrence in the filing of this document has been obtained from each of
its signatories.

Dated: December 4, 2007



Stuart N. Senator